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No. 87-311

In The

Supreme Court of the United States

October Term, 1987

UNIMILLS B.V. and
MARGARINE VERKAUFS UNION GmbH,
Petitioners,

vs.

STATISTIX SHIPPING, N.V.,
ARTH. H. MATHIESEN and
REDERI A/S MASCOT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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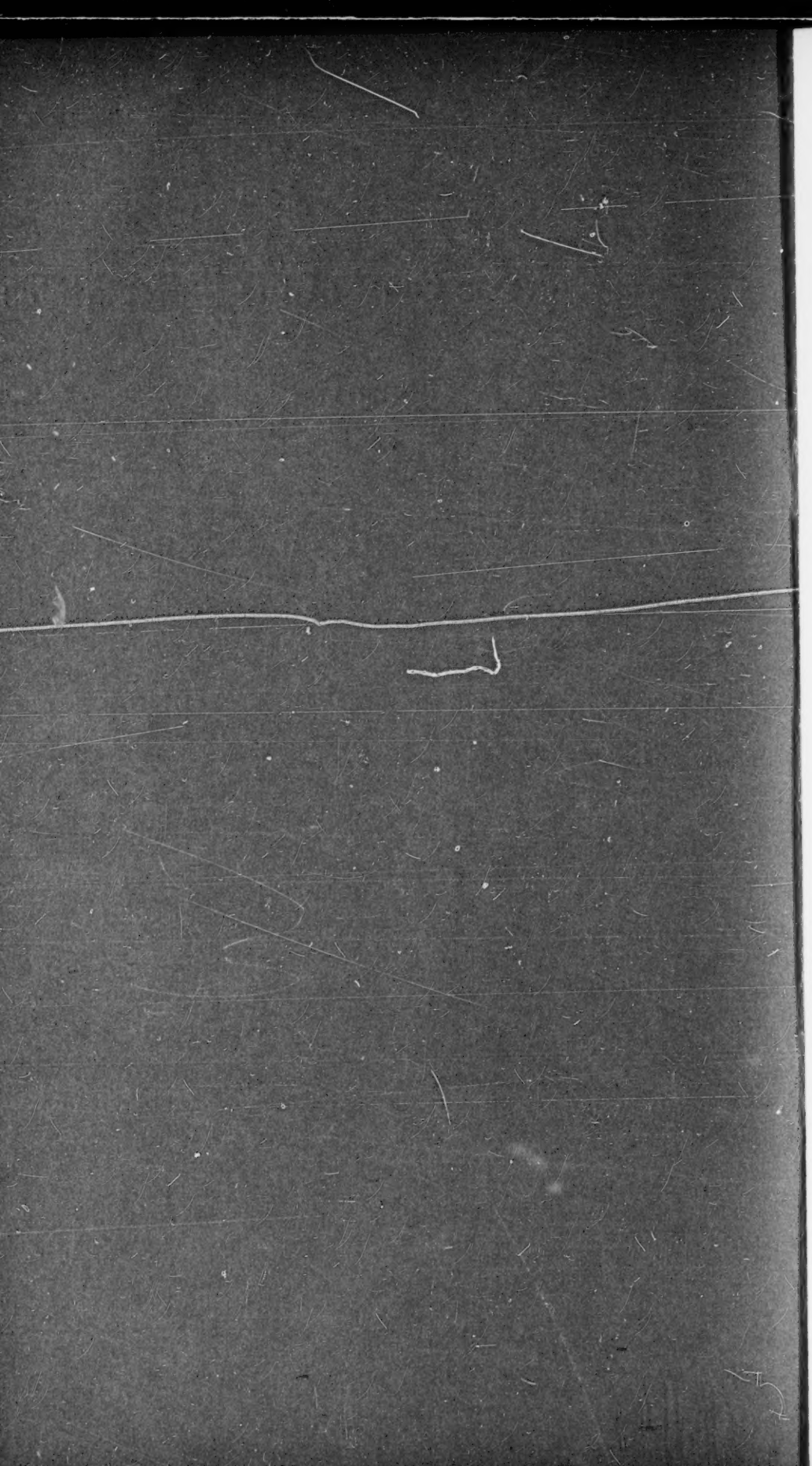

QUESTIONS TO BE PRESENTED FOR REVIEW

1. Whether the ruling in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927), should be applied to prevent recovery in tort for purely economic damages only in those actions presenting a realistic prospect that a judgment allowing recovery would give rise to an indeterminate number of claims by an indeterminate number of claimants.

2. Whether recovery by a shipper from a tortfeasor for out-of-pocket collision expenditures benefiting a voyage should be allowed under the concept of common venture, by which cargo interests are said to derive rights outside a charter party or contract of affreightment, even though cargo is not physically on board a vessel at the time of collision.

3. Whether the exceptions provision in a charter party, incorporating sections 1301 and 1304 of the Carriage Of Goods By Sea Act, 46 U.S.C. § 1301, has any effect where no common venture yet exists, or, in any event, where there is no determination that a carrier exercised due diligence in making the vessel seaworthy at the commencement of the voyage.

PARTIES TO THE PROCEEDINGS

Unimills B.V.
Margarine Verkaufs Union GmbH.
Arth. H. Mathiesen
Rederi A/S Mascot
Statistix Shipping N.V.*
M/V OBELIX, *in rem*
M/V BARBRO, *in rem*

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* Pursuant to Rule 28.1, respondent Statistix Shipping, N.V. discloses that its parent is SHV Nederland N.V.

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents, Statistix Shipping, N.V., Arth. H. Mathiesen and Rederi A/S Mascot, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE PETITION IS IMPROPER

The Petition is nothing more than another bite at the proverbial apple, a repetition of the appeal on the merits.

"The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

Petitioners' reasons fail on their face to comport with the historic bases for granting certiorari. *See* Sup. Ct. R. 17. No conflict between circuits is cited. No conflict with applicable decisions by the Court is alleged. No important question of federal law which has not been settled by the Court is identified. *Compare Layne & Bower Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties") *with* Petition ("Pet.") 6 ("petitioners raise the issue here only insofar as it need be considered to resolve *their* claims") (emphasis added).

The Petition should not be entertained.

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II

ROBINS SHOULD REMAIN INVIOLATE

The Fifth Circuit applied *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), to preclude recovery of petitioners' alleged economic losses because the losses were unassociated with physical damage to a proprietary interest. Appendix to Petition ("Pet. App.") A 3-7. The vitality of the *Robins* doctrine has not been diminished by

the passage of time. *See East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). *See also Candlewood Navigation Corp. v. Mitsui O.S.K. Lines Ltd.*, [1985] 2 Lloyd's Rep. 303, 308. Petitioners acknowledge *Robins'* utility as a pragmatic limit on recovery of economic losses establishing stability, continuity and predictability in the marketplace as well as in the courthouse. Pet. 6. *See State ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1023 (5th Cir. 1985) (*en banc*), *cert. denied sub nom. White v. M/V TESTBANK*, 106 S. Ct. 3271 (1986).

Nonetheless, petitioners urge the Court to abandon the "bright line" approach of *Robins* in favor of an approach precluding recovery "only in those actions presenting a realistic prospect that a judgment allowing recovery would give rise to an indeterminate number of claims by an indeterminate number of claimants." Pet. 5, 5-11. Merely stating this proposed standard exposes why it would strand *Robins* on the very reef the Court navigated clear of fifty years ago. The proposed standard would forever have commercial parties wondering and courts attempting to decide whether a particular tort has a realistic prospect of giving rise to an indeterminate number of claims by an indeterminate number of claimants for an indeterminate time.

Paradoxically, if the "indeterminate" standard could result in recovery under the facts here, it certainly would have resulted in recovery by the vessel's time charterer in *Robins*.

Petitioners' suggestion that there is a special rule for collision cases is baseless. Pet. 8-9. Indeed, the Court's

comment in *Robins* that *Elliott Steam Tug Co. v. The Shipping Controller*, [1922] 1 K.B. 127, 139-40, a collision case wherein charterer was denied recovery of economic losses, is a "good statement, applicable here," 275 U.S. at 309, established beyond any question that the rule obtains in collision cases. *See also TESTBANK*, 752 F.2d 1019 (a collision case). The authority cited by petitioners, Pet. 12, is inapposite; recovery was allowed in those cases on the basis that the claimants had the requisite proprietary interest by reason of having been participants in maritime common ventures as owners of cargo aboard the vessels at the time of the collisions. *See Aktieselskabet Cuzco v. The SUCARSECO* (*The TOLUMA*), 294 U.S. 394, 404 (1935); *Amoco Transport Co. v. S/S MASON LYKES*, 768 F.2d 659, 668 (5th Cir. 1985). This element, of course, is wholly absent here.

———o———

III

THERE IS NO BASIS FOR EXTENDING *TOLUMA*

As the Fifth Circuit stated, "the extension [petitioners] seek does violence to the essence of the notion of common venture between cargo and carrier, because prior to the time the cargo is loaded there is no sharing the risks of the sea and of the obligation of general average." Pet. App. A 5-6.

Petitioners, apparently conscious of the absurdity of their suggestion below, would now have the Court apply English law (put forward for the very first time at any

stage of these proceedings) rather than American law to the issue of whether a common venture of the nature contemplated by *TOLUMA* existed. Pet. 16-19. Putting aside the question of whether English law may be resorted to at all, English law, like ours, does not recognize a common venture between cargo and vessel until cargo is aboard the vessel and thereby exposed to common peril. *Crooks v. Allan*, (1879) 5 Q.B.D. 38, 40 ("general average contribution [by cargo] can only arise in respect of damage [occurring] on ship [not ashore]"); *Walthew v. Mavrojani*, [1870] 5 L.R.-Ex. 116, 123-125; R. Lowndes & G. Rudolph, *General Average and York Antwerp Rules* 9, 39-49, 817 (10th ed. 1975). Petitioners' argument that because freight can be called upon to contribute in general average on a ballast voyage, Pet. 16-17, cargo must also be considered part of the common venture on a ballast voyage is refuted by the very authority cited:

> [I]f the vessel has broken ground on a voyage, the ballast portion of which is indivisible from the laden portion, chartered freight should contribute to a general average loss or expense suffered or incurred on the ballast portion of the voyage. *Cargo carried on the laden portion would not, however, be involved in the adventure and would not contribute.*

Lowndes & Rudolph at 817 (emphasis added).

The physical union of cargo and vessel is the fundamental predicate upon which the notion of maritime common venture between cargo and vessel rests. Absent that union, as here, there is not and cannot be a common venture. Thus, petitioners' suggestion incorrectly states the English law concept of maritime common venture as well as the American.

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IV

COGSA EXCEPTIONS INCORPORATED IN THE CHARTER PRECLUDE RECOVERY

Petitioners' third argument turns solely on contract construction and application, issues of fact clearly not appropriate for review by the Court. *See* R. Stern, E. Gressman & Shapiro, *Supreme Court Practice* § 4.14 at 217 (6th ed. 1986).

In any event, there is complete consistency in the Fifth Circuit's findings that the common venture had not yet begun but that the terms of the charter were operative. *Cf.* Pet. 21. Common venture relates to the relationship between a vessel owner and a cargo owner, whereas a charter relates to the relationship between a vessel owner and a charterer. A common venture does not commence until there is a union between cargo and vessel, *see* Point III *supra,* whereas a charter becomes operative as soon as the vessel begins her voyage to the loadport. *United States v. M/V MARILENA P,* 433 F.2d 164, 170 (4th Cir. 1969); *Scrutton on Charter Parties and Bills of Lading* Art. 65 at 121-22, 123 & n.10 (19th ed. 1984) (hereinafter "Scrutton") (citing *Hudson v. Hill,* (1874) 43 L.J.C.P. 273, (1873-1876) 2 Asp. M.L.C. 278, 281). Completely contrary to petitioners' assertion, *see* Pet. 20-21, *Hudson* and Scrutton do not suggest commercial frustration as a prerequisite to operation of the exceptions provision of a charter. They state exactly the opposite. *Hudson,* (1873-1876) 2 Asp. M.L.C. at 281; Scrutton, Art. 65 at 122 n.8. As COGSA was a term of the subject charter, the Fifth Circuit properly applied the COGSA exception to liability for delay arising out of negligent navigation pursuant to 46 U.S.C.

§ 1304(a) and (q). *See* R. 193 (petitioners' stipulation that negligent navigation caused the collision).

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CONCLUSION

The Petition should be denied as it fails to raise any issues appropriate to the jurisdiction of the Court.

Respectfully submitted,

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